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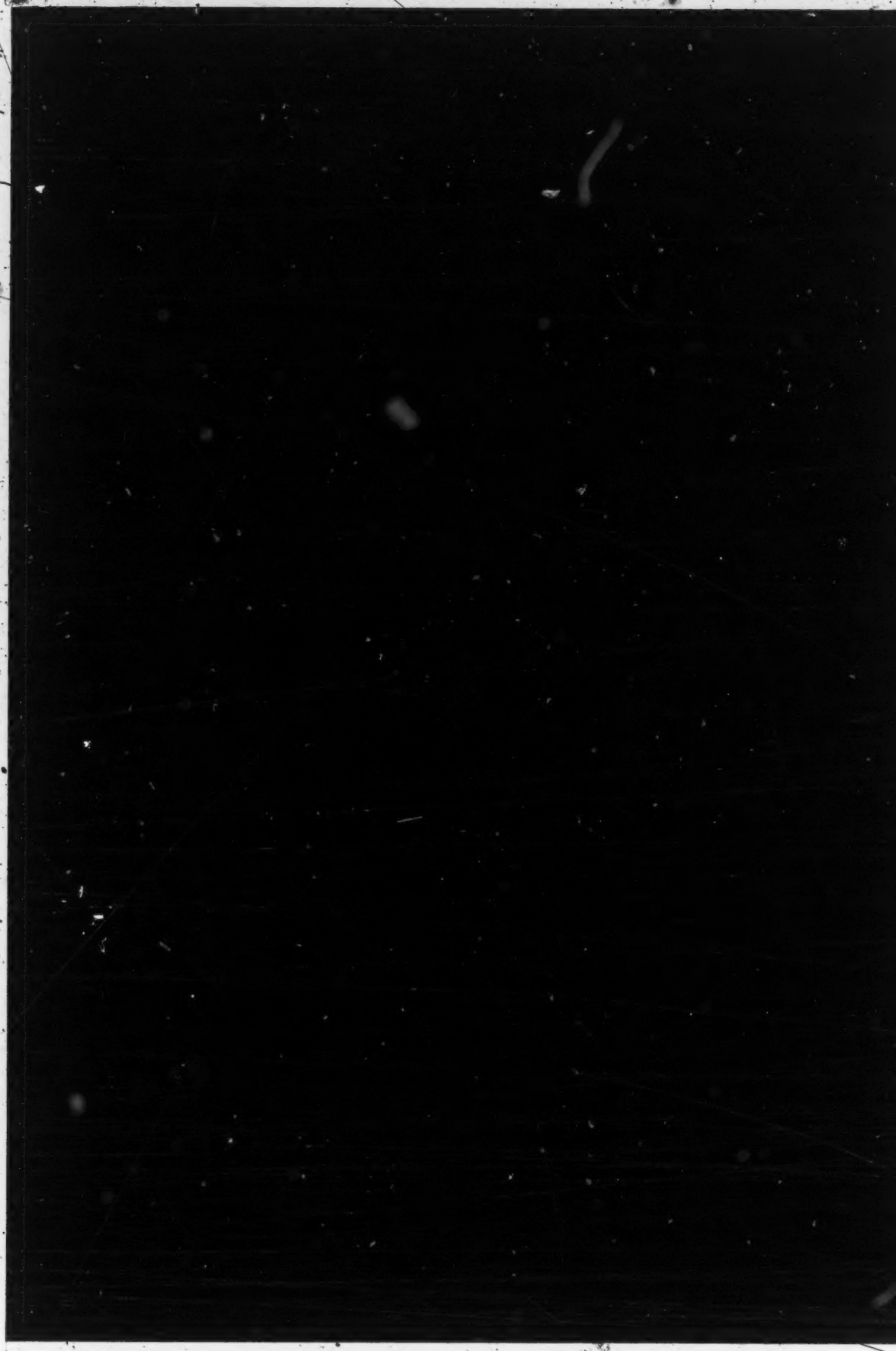

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 246

HERMAN MOSES, ROBERT ALLEN, JR., LARRY MAURICE, LAWRENCE JERRY, DONALD JERRY, STAN MOSES, BURT MOSES, EDWIN B. DANIELS, HOWARD MOSES, BETTY GOUDY, HENRY KING GEORGE, WALTER ALLEN, ANDY DOMINICK, ARCHIE LEBEHAN, CECIL MOSES, and the MUCKLESHOOT TRIBE OF INDIANS,

Appellants,

v.

THE STATE OF WASHINGTON, THE DEPARTMENT OF FISHERIES, and THE DEPARTMENT OF GAME,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS APPEAL

The Appellee in the above-entitled case moves to dismiss the appeal from the Supreme Court of the State of Washington on the following grounds:

(1) The appeal is not within the jurisdiction of this court because not taken in conformity to statute or court rule.

(2) The appeal does not present a substantial federal question.

(3) The federal questions sought to be reviewed were not timely nor properly raised, or passed on by the courts of the state of Washington.

STATEMENT

The Green River is located in King County, Washington. No part of the river flows through the Muckleshoot Indian Reservation, which is also located in King County, Washington. In September of 1963 a number of Muckleshoot Indians began net-fishing openly on the Green River.

On September 27, 1963, the King County Superior Court issued a temporary restraining order against 15 named Indians prohibiting the removal of food fish from the Green River. The court later enjoined any fishing on the Green River pending a trial on the merits. The complaint stated that continued net fishing was an unreasonable use of the river in that it would deplete the number of fish within the river, and thus constituted a public nuisance.

The case was removed to the United States District Court for the Western District of Washington, and remanded to the state court on October 28, 1963.

The defendants answered the complaint by requesting an order granting them special privileges and immunities from the operation of state law by reason of the Point Elliott Treaty, and asserting counterclaims for $3,180,000 and $1,500,000. The Muckleshoot Tribe of Indians was joined as a party defendant, and the State of Washington Departments of Fisheries and Game intervened as parties plaintiff.

A trial on the merits lasted from November 24 to December 3, 1964. At its conclusion the court entered 31 Findings of Fact and 7 Conclusions of Law, holding that the defendants were not members of a tribe which was signatory to the Treaty of Point Elliott, and that the continued fishing practices of the defendants would

"ultimately destroy the effectiveness of the state's conservation program." A permanent injunction was signed on February 11, 1965.

The case was then appealed to the Supreme Court of the State of Washington. Appellants claimed five assignments of error: (1) Refusal of the trial court to be bound by the testimony of George Felshaw; (2) Refusal of the trial court to permit the testimony of Malcolm McLeod as to historical facts; (3) Refusal of the trial court to apply the indispensability test to the regulation of taking of game and fish by Indians; (4) Refusal to apply the rule of *res adjudicata;* and (5) Dismissal of cross-complaint for damages. No constitutional issues were raised at that time.

The State Supreme Court affirmed the trial court on January 12, 1967, holding that the defendants had failed to prove that they were members of a tribe that was signatory to the Point Elliott Treaty. *State of Washington v. Herman Moses, et al.*, 70 W.D.2d 276, 422 P.2d 775 (1967). Appellants then took appeal to this court.

ARGUMENT

I.

The Appeal Is Not Within the Jurisdiction of This Court, Because Not Taken in Conformity to Statute or Court Rule

The jurisdictional grounds for an appeal to this court from a decision of a state Supreme Court are set out in 28 U.S.C., § 1257. A perusal of the opinion of the Supreme Court of the State of Washington, as set out in Appellants' Jurisdictional Statement at A-45 to A-53, indicates that the court below did not *consider* the validity or invalidity of a treaty or statute of the United States, much less rule against the same. The court below

in fact recognized the validity of the Treaty of Point Elliott, and affirmed the trial court's holding that appellants did not show that they are members of any tribe which was signatory to that treaty. At best, appellants' argument rests upon a denial of a claim under the Treaty of Point Elliott. This has been held insufficient to give this court jurisdiction by appeal, *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 78 Sup. Ct. 1174, 2 L.ed.2d 1313 (1957).

Neither did the court below construe the constitutionality of any state statute. Appellant's brief in the court below did not explicitly challenge any state statute. Several state statutes are cited in Appellant's Jurisdictional Statement, at A-54 to A-56, however these statutes have not been presented to the State Supreme Court for a decision as to validity or invalidity. In the absence of such a challenge, and subsequent court construction upholding validity, there is no jurisdiction by appeal.

Appellant cites *Worcester v. Georgia*, 31 U.S. 515, 6 Pet. 515 (1832), in support of his jurisdictional statement. That case offers no support for appelant's contention of jurisdiction herein. The *Worcester* case involved a writ of error to the United State Supreme Court, the instant case is an appeal. The former case involved state regulation of non-Indians residing on Indian land (the Cherokee reservation), the present case deals with the regulation of off-reservation fishing. The defendant in *Worcester* attacked the constitutionality of the statute involved in his answer. In this case no statute has been attacked on constitutional grounds prior to Appellants' Jurisdictional Statement herein.

II.

The Appeal Does Not Present a Substantial Federal Question

Appellant lists five questions in support of the substantiality of the federal claim asserted (Jurisdictional Statement, pages 5-6, 9-18), yet does not point to any specific provision of the U.S. Constitution in support thereof. Question one deals with an issue of fact which was not assigned as error in the court below. Questions two, four and five deal with issues not presented to the court below for consideration. The court below did not need to meet question three because of the holding therein. That question was not necessary to the determination of the case. While the case of *The Department of Game v. The Puyallup Tribe*, 70 W.D.2d 241, 422 P.2d 754 (1967), which is set out in Appellants' Jurisdictional Statement at pp: A-9 to A-39, does consider this issue, the holding in the present case in the State Supreme Court was not based upon the *Puyallup* case. Appellant seeks his appeal because of issues raised in another case.

III.

The Federal Questions Sought To Be Reviewed Were Not Timely Nor Properly Raised, Or Passed on by the Courts of the State of Washington

The opinion of the State Supreme Court is set out in Appellants' Jurisdictional Statement at pages A-45 to A-53. Five assignments of error were presented to that court: (1) Refusal of the trial court to be bound by the testimony of George Felshaw; (2) Refusal of the trial court to permit the testimony of Malcolm McLeod as to historical facts; (3) Refusal of the trial court to apply the indispensability test to regulation of taking of game and fish by Indians; (4) Refusal to apply the rule of

res adjudicata; and (5) Dismissal of cross-complaint for damages. No constitutional issues were raised at that time.

The federal questions which appellant now seeks to raise were not presented to the Supreme Court of the State of Washington. See *Beck v. Washington*, 369 U.S. 541, at 549 ff, 82 Sup. Ct. 955, 9 L.ed.2d 98 (1961). Appellee respectfully submits that federal constitutional questions may not be presented to this court unless the precise questions have been placed in issue before the state court.

CONCLUSION

Appellee respectfully submits that the appellant presents no substantial question for the decision of this court, and that the questions which appellant attempts to raise could and should have been raised in the court below. For all of the foregoing reasons appellee moves that this appeal be dismissed.

Respectfully submitted,

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